

# April 2003

## Update: Sexual Assault Benchbook

### CHAPTER 2

#### The Criminal Sexual Conduct Act

##### 2.2 “Penetration” Offenses

###### A. Criminal Sexual Conduct— First Degree

###### 1. Statutory Authority

Effective April 1, 2003, 2002 PA 714 amended MCL 750.520b by adding subparagraph (1)(b)(iv) which specifically prohibits a teacher or school administrator at a public or nonpublic school\* from engaging in sexual penetration with a person who is at least 13 but less than 16 years old and who is enrolled in that particular school.

Thus, replace the existing statutory block quotation in Section 2.2(A)(1) with the following block quotation (the added statutory language is bolded):

MCL 750.520b (CSC I—Penetration) provides:

“(1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

“(a) That other person is under 13 years of age.

“(b) That other person is at least 13 but less than 16 years of age and any of the following:

“(i) The actor is a member of the same household as the victim.

“(ii) The actor is related to the victim by blood or affinity to the fourth degree.

“(iii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

“(iv) **The actor is a teacher, substitute teacher, or administrator of the public or nonpublic school in which that other person is enrolled.**

\*For a definition of a “public” and “nonpublic” school, see the revised school code at MCL 380.5. 2002 PA 714.

“(c) Sexual penetration occurs under circumstances involving the commission of any other felony.

“(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:

“(i) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

“(ii) The actor uses force or coercion to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in subdivision (f)(i) to (v).

“(e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.

“(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes but is not limited to any of the following circumstances:

“(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

“(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

“(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, ‘to retaliate’ includes threats of physical punishment, kidnapping, or extortion.

“(iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.

“(v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.

“(g) The actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

“(h) That other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and any of the following:

“(i) The actor is related to the victim by blood or affinity to the fourth degree.

“(ii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

“(2) Criminal sexual conduct in the first degree is a felony punishable by imprisonment in the state prison for life or for any term of years.” [Emphasis added.]

## CHAPTER 2

### The Criminal Sexual Conduct Act

#### 2.2 “Penetration” Offenses

##### B. Criminal Sexual Conduct— Third Degree

###### 1. Statutory Authority

Effective April 1, 2003, 2002 PA 714 amended MCL 750.520d by adding subparagraph (1)(e) which specifically prohibits a teacher or school administrator at a public or nonpublic school\* from engaging in sexual penetration with a person who is at least 16 but less than 18 years old and who is a student at that particular school. New subparagraph (1)(e) specifically exempts emancipated students and those who are lawfully married to the actor at the time of the alleged violation.

\*For a definition of a “public” and “nonpublic” school, see the revised school code at MCL 380.5. 2002 PA 714.

Thus, replace the existing statutory block quotation in Section 2.2(B)(1) with the following block quotation (the added statutory language is bolded):

MCL 750.520d (CSC III—Penetration) provides:

“(1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:

“(a) That other person is at least 13 years of age and under 16 years of age.

“(b) Force or coercion is used to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1)(f)(i) to (v).

“(c) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

“(d) That other person is related to the actor by blood or affinity to the third degree and the sexual penetration occurs under circumstances not otherwise prohibited by this chapter. It is an affirmative defense to a prosecution under this subdivision that the other person was in a position of authority over the defendant and used this authority to coerce the defendant to violate this subdivision. The defendant has the burden of proving this defense by a preponderance of the evidence. This subdivision does not apply if both persons are lawfully married to each other at the time of the alleged violation.

**“(e) That other person is at least 16 years of age but less than 18 years of age and a student at a public or nonpublic school, and the actor is a teacher, substitute teacher, or administrator of that public or nonpublic school. This subdivision does not apply if the other person is emancipated or if both persons are lawfully married to each other at the time of the alleged violation.**

“(2) Criminal sexual conduct in the third degree is a felony punishable by imprisonment for not more than 15 years.” [Emphasis added.]

## CHAPTER 2

### The Criminal Sexual Conduct Act

#### 2.3 “Contact” Offenses

##### A. Criminal Sexual Conduct— Second Degree

###### 1. Statutory Authority

Effective April 1, 2003, 2002 PA 714 amended MCL 750.520c by adding subparagraph (1)(b)(iv) which specifically prohibits a teacher or school administrator at a public or nonpublic school\* from engaging in sexual contact with a person who is at least 13 but less than 16 years old and who is enrolled in that particular school.

Thus, replace the existing statutory block quotation in Section 2.3(A)(1) with the following block quotation (the added statutory language is bolded):

MCL 750.520c (CSC II—Contact) provides:

“(1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:

“(a) That other person is under 13 years of age.

“(b) That other person is at least 13 but less than 16 years of age and any of the following:

“(i) The actor is a member of the same household as the victim.

“(ii) The actor is related by blood or affinity to the fourth degree to the victim.

“(iii) The actor is in a position of authority over the victim and the actor used this authority to coerce the victim to submit.

“(iv) **The actor is a teacher, substitute teacher, or administrator of the public or nonpublic school in which that other person is enrolled.**

“(c) Sexual contact occurs under circumstances involving the commission of any other felony.

“(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:

“(i) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

“(ii) The actor uses force or coercion to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the circumstances listed in sections 520b(1)(f)(i) to (v).

\*For a definition of a “public” and “nonpublic” school, see the revised school code at MCL 380.5. 2002 PA 714.

“(e) The actor is armed with a weapon, or any article used or fashioned in a manner to lead a person to reasonably believe it to be a weapon.

“(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual contact. Force or coercion includes, but is not limited to, any of the circumstances listed in section 520b(1)(f)(i) to (v).

“(g) The actor causes personal injury to the victim and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

“(h) That other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and any of the following:

“(i) The actor is related to the victim by blood or affinity to the fourth degree.

“(ii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

“(i) That other person is under the jurisdiction of the department of corrections and the actor is an employee or a contractual employee of, or a volunteer with, the department of corrections who knows that the other person is under the jurisdiction of the department of corrections.

“(j) That other person is under the jurisdiction of the department of corrections and the actor is an employee or a contractual employee of, or a volunteer with, a private vendor that operates a youth correctional facility under section 20g of 1953 PA 232, MCL 791.220g, who knows that the other person is under the jurisdiction of the department of corrections.

“(k) That other person is a prisoner or probationer under the jurisdiction of a county for purposes of imprisonment or a work program or other probationary program and the actor is an employee or a contractual employee of or a volunteer with the county or the department of corrections who knows that the other person is under the county’s jurisdiction.

“(l) The actor knows or has reason to know that a court has detained the victim in a facility while the victim is awaiting a trial or hearing, or committed the victim to a facility as a result of the victim having been found responsible for committing an act that would be a crime if committed by an adult, and the actor is an employee or contractual employee of, or a volunteer with, the facility in which the victim is detained or to which the victim was committed.

“(2) Criminal sexual conduct in the second degree is a felony punishable by imprisonment for not more than 15 years.” [Emphasis added.]

## CHAPTER 2

### The Criminal Sexual Conduct Act

#### 2.3 “Contact” Offenses

##### B. Criminal Sexual Conduct— Fourth Degree

###### 1. Statutory Authority

Effective April 1, 2003, 2002 PA 714 amended MCL 750.520e by adding subparagraph (1)(f) which specifically prohibits a teacher or school administrator at a public or nonpublic school\* from engaging in sexual contact with a person who is at least 16 but less than 18 years old and who is a student at that particular school. New subparagraph (1)(f) specifically exempts emancipated students and those who are lawfully married to the actor at the time of the alleged violation.

\*For a definition of a “public” and “nonpublic” school, see the revised school code at MCL 380.5. 2002 PA 714.

Thus, replace the existing statutory block quotation in Section 2.3(B)(1) with the following block quotation (the added statutory language is bolded):

MCL 750.520e (CSC IV—Contact) provides:

“(1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exist:

“(a) That other person is at least 13 years of age but less than 16 years of age, and the actor is 5 or more years older than that other person.

“(b) Force or coercion is used to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the following circumstances:

“(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

“(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute that threat.

“(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute that threat. As used in this subparagraph, ‘to retaliate’ includes threats of physical punishment, kidnapping, or extortion.

“(iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.

“(v) When the actor achieves the sexual contact through concealment or by the element of surprise.

“(c) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

“(d) That other person is related to the actor by blood or affinity to the third degree and the sexual contact occurs under circumstances not otherwise prohibited by this chapter. It is an affirmative defense to a prosecution under this subdivision that the other person was in a position of authority over the defendant and used this authority to coerce the defendant to violate this subdivision. The defendant has the burden of proving this defense by a preponderance of the evidence. This subdivision does not apply if both persons are lawfully married to each other at the time of the alleged violation.

“(e) The actor is a mental health professional and the sexual contact occurs during or within 2 years after the period in which the victim is his or her client or patient and not his or her spouse. The consent of the victim is not a defense to a prosecution under this subdivision. A prosecution under this subsection shall not be used as evidence that the victim is mentally incompetent.

**“(f) That other person is at least 16 years of age but less than 18 years of age and a student at a public or nonpublic school, and the actor is a teacher, substitute teacher, or administrator of that public or nonpublic school. This subdivision does not apply if the other person is emancipated or if both persons are lawfully married to each other at the time of the alleged violation.**

“(2) Criminal sexual conduct in the fourth degree is a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than \$500.00, or both.” [Emphasis added.]



## CHAPTER 2

### The Criminal Sexual Conduct Act

#### 2.5 Terms Used in the CSC Act

Effective April 1, 2003, 2002 PA 714 amended the CSC Act by adding provisions specifically prohibiting a teacher or school administrator at a public or nonpublic school from engaging in sexual penetration or sexual contact with a student enrolled at that particular school.

Thus, insert the new subsection 2.5(R) “Nonpublic school” on p 87 and new subsection 2.5(U) “Public school” on p 100, and redesignate the remaining subsections in Section 2.5 accordingly:

##### **R. “Nonpublic School”**

Effective April 1, 2003, 2002 PA 714 amended the CSC I and CSC II statutes to criminalize the sexual penetration or sexual touching of a person at least 13 but less than 16 years of age in the following circumstances:

- : When the perpetrator is a teacher, substitute teacher, or administrator at a public or nonpublic school in which that other person is enrolled. MCL 750.520b(1)(b)(iv) (CSC I) and MCL 750.520c(1)(b)(iv) (CSC II).

Effective April 1, 2003, 2002 PA 714 amended the CSC III and CSC IV statutes to criminalize the sexual penetration or sexual touching of a person at least 16 but less than 18 years of age in the following circumstances:

- : When the perpetrator is a teacher, substitute teacher, or administrator at a public or nonpublic school in which that other person is a student. MCL 750.520d(1)(e) (CSC III) and MCL 750.520e(1)(f) (CSC IV).

**Note:** 2002 PA 714 specifically exempts, under both CSC III and CSC IV, victims who are emancipated students or students who are lawfully married to the actor at the time of the alleged violation. MCL 750.520d(1)(e) (CSC III) and MCL 750.520e(1)(f) (CSC IV).

MCL 750.520a(j), by reference, defines “nonpublic school” as “a private, denominational, or parochial school.” MCL 380.5(3). For a definition of “public school,” see Section 2.5(U), below.

## U. “Public School”

Effective April 1, 2003, 2002 PA 714 amended the CSC I and CSC II statutes to criminalize the sexual penetration or sexual touching of a person at least 13 but less than 16 years of age in the following circumstances:

- : When the perpetrator is a teacher, substitute teacher, or administrator at a public or nonpublic school in which that other person is enrolled. MCL 750.520b(1)(b)(iv) (CSC I) and MCL 750.520c(1)(b)(iv) (CSC II).

Effective April 1, 2003, 2002 PA 714 amended the CSC III and CSC IV statutes to criminalize the sexual penetration or sexual touching of a person at least 16 but less than 18 years of age in the following circumstances:

- : When the perpetrator is a teacher, substitute teacher, or administrator at a public or nonpublic school in which that other person is a student. MCL 750.520d(1)(e) (CSC III) and MCL 750.520e(1)(f) (CSC IV).

**Note:** 2002 PA 714 specifically exempts, under both CSC III and CSC IV, victims who are emancipated students or students who are lawfully married to the actor at the time of the alleged violation. MCL 750.520d(1)(e) (CSC III) and MCL 750.520e(1)(f) (CSC IV).

MCL 750.520a(m), by reference, defines “public school” as “a public elementary or secondary educational entity or agency that is established under this act, has as its primary mission the teaching and learning of academic and vocational-technical skills and knowledge, and is operated by a school district, local act school district, special act school district, intermediate school district, public school academy corporation, strict discipline academy corporation, or by the department or state board. Public school also includes a laboratory school or other elementary or secondary school that is controlled and operated by a state public university described in section 4, 5, or 6 of article VIII of the state constitution of 1963.” MCL 380.5(5).

For a definition of “nonpublic school,” see Section 2.5(R), above.

## CHAPTER 11

### Sex Offender Identification and Profiling Systems

#### 11.2 Sex Offenders Registration Act

##### L. Pertinent Case Law Challenging Registration Act

###### 1. Retroactive Application

Add the following language at the end of Section 11.2(L)(1) on p 528:

In a case of first impression, the United States Supreme Court has held that the registration and notification requirements in a state's "Megan's Law" do not constitute punishment and thus may be applied retroactively under the *Ex Post Facto Clause*.

In *Smith v Doe*, \_\_\_ US \_\_\_ (2003), two convicted sex offenders brought suit seeking to declare Alaska's Sex Offender Registration Act void under the *Ex Post Facto Clause*. The respondent sex offenders, whose convictions were entered before the passage of the Act, claimed that the Act's registration and notification requirements, which applied to them under the terms of the Act, constituted retroactive punishment in violation of the *Ex Post Facto Clause*. In reversing the Court of Appeals, the Supreme Court found that the Act is nonpunitive, thus making retroactive application permissible and not violative of the *Ex Post Facto Clause*. In coming to this conclusion, the Supreme Court found that the intent of the Alaska Legislature in promulgating the Act "was to create a civil, nonpunitive regime," whose primary purpose was to "protect[] the public from sex offenders." *Id.* at \_\_\_, \_\_\_.

In addition to finding that the Alaskan Legislature's intent in promulgating the Act was nonpunitive, the Court also found that the purpose and effect of the Act's statutory scheme is not so punitive as to negate the state's intention to deem it civil. In so holding, the Court determined that the Act (1) has not been regarded in history and tradition as punishment; (2) does not impose an affirmative disability or restraint; (3) does not promote the traditional aims of punishment; (4) has a rational connection to a nonpunitive purpose; and (5) is not excessive with respect to that purpose.

## CHAPTER 11

### Sex Offender Identification and Profiling Systems

#### 11.2 Sex Offenders Registration Act

##### L. Pertinent Case Law Challenging Registration Act

##### 4. Double Jeopardy, Equal Protection, and Due Process Under U.S. Constitution

Replace the Note on p 530 with the following language:

The United States Supreme Court has held that due process does not require a state to provide a hearing to determine “current dangerousness” before it publicly discloses a convicted sex offender’s name, address, photograph, and description on its sex offender registry.

In *Connecticut Department of Public Safety v Doe*, \_\_\_ US \_\_\_ (2003), the respondent, a convicted sex offender, brought suit against the Connecticut Department of Public Safety on behalf of himself and other sex offender registrants, claiming that the public disclosure of names, addresses, photographs, and descriptions on Connecticut’s sex offender registry violates procedural due process under the Fourteenth Amendment. Respondent specifically argued that he and the other registrants were deprived of a liberty interest—reputation combined with status alteration under state law—without first being afforded a predeprivation hearing to determine “current dangerousness.” In reversing the judgments of the Court of Appeals and district court, which held that due process requires such a hearing, the Supreme Court began its analysis by first noting that under *Paul v Davis*, 424 US 693 (1976), “mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest.” *Connecticut Department of Public Safety v Doe*, *supra* at \_\_\_. But the Court found it unnecessary to even address this specific question, because “due process does not entitle [respondent] to a hearing to establish a fact that is not material under the Connecticut statute.” *Id.* at \_\_\_. The Supreme Court stated that the fact at issue here, i.e., “current dangerousness,” is of no consequence under Connecticut’s sex offender registry because Connecticut requires registration “solely by virtue of [the individual’s] conviction record and state law.” Moreover, the Connecticut registry even provides a disclaimer on its website that a registrant’s alleged nondangerousness does not matter. Thus, the Supreme Court concluded as follows:

“In short, even if respondent could prove that he is not likely to be currently dangerous, Connecticut has decided that the registry information of *all* sex offenders—currently dangerous or not—must be publicly disclosed. Unless respondent can show that that *substantive* rule of law is defective (by conflicting with a provision of the Constitution), any hearing on current dangerousness is a bootless exercise. . . .

“Plaintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme. Respondent cannot make that showing here.” [Emphases in original.] *Id.* at \_\_\_\_.

The Supreme Court decided this case only on procedural, not substantive, due process grounds, stating that “[because] respondent ‘expressly disavow[ed] any reliance on the substantive component of the Fourteenth Amendment’s protections, . . . we express no opinion on whether Connecticut’s Megan’s Law violates substantive due process. *Id.* at \_\_\_\_.